No. 85-235

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES THRASHER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fourth District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether petitioner's failure to raise in the state trial and appellate courts the constitutional claim now advanced before this Court precludes review of the claim?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW ...	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTIONAL STATEMENT	2
STATEMENT OF THE CASE	2
REASON FOR DENYING THE PETITION FOR WRIT OF CERTIORARI:	
PETITIONER'S FAILURE TO RAISE IN THE STATE TRIAL AND APPELLATE COURTS THE CONSTITUTIONAL CLAIM NOW ADVANCED BEFORE THIS COURT PRECLUDES REVIEW OF THE CLAIM	3
CONCLUSION	6

TABLE OF AUTHORITIES

Cases	PAGE
Crowell v. Randell, 10 Pet. 368 (1836)	5
Gates v. Illinois, 462 U.S. 213 (1983)	4
Hankerson v. North Carolina, 423 U.S. 233 (1977) ..	5
Michigan v. Tyler, 436 U.S. 499 (1978)	5
State Farm Mutual Automobile Insurance Co. v. Duel, 324 U.S. 154 (1945)	5
Tacon v. Arizona, 410 U.S. 351 (1973)	5

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The order of the Illinois Appellate Court, Fourth District, is unreported pursuant to Illinois Supreme Court Rule 23, Ill. Rev. Stat. ch. 110A, § 23. The order has been submitted to this Court as an Appendix to the Petition for Writ of Certiorari and, therefore, is not contained in this Brief in Opposition.

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Petitioner, James Thrasher, was convicted in the Circuit Court of the Eleventh Judicial Circuit, McLean County, on May 24, 1984, of indecent liberties with a child and contributing to the sexual delinquency of a child in violation of Ill. Rev. Stat. 1983, ch. 38, §§ 11-4(a) and 11-5(a) respectively. On July 1, 1984, these offenses were repealed by Public Act 83-1067. Ill. Rev. Stat. (Supp. 1984), ch. 38, §§ 11-1 to 11-5. In their place new offenses were enacted. Ill. Rev. Stat. (Supp. 1984), ch. 38, §§ 12-13 to 12-16. Petitioner on July 26, 1984, was sentenced under the old law to four years imprisonment for indecent liberties with a child and 364 days imprisonment for contributing to the sexual delinquency of a child in that section 27 of the new act provided:

> Savings clause, construction. The abolition of any offense by this Act does not affect any prosecution pending, penalty, punishment, disqualification from office or employment, forfeiture incurred, or rights, powers or remedies accrued under any law in effect immediately prior to the effective date of this amendatory Act of 1983, which related to the abolished offense. The provisions of this amendatory Act insofar as they are the same or substantially the same as those of any prior statute, shall be construed as a continuation of such a prior statute and not as a new enactment.

> This amendatory Act of 1983 shall only apply to those persons who commit offenses prohibited under Sections 12-13 through 12-16 of the Criminal Code of 1961, as amended, on or after the effective date of this amendatory Act.

Ill. Rev. Stat. (Supp. 1984), ch. 38, foll. § 12-12. The sentences were to run concurrently.

Petitioner appealed from a judgment of conviction to the Illinois Appellate Court, Fourth District. The court on March 6, 1985, affirmed the convictions in an unpublished order. Subsequently, petitioner filed a Petition for Leave to Appeal to the Illinois Supreme Court pursuant to Illinois Supreme Court Rule 315. Ill. Rev. Stat. ch. 110A, § 315. The Illinois Supreme Court on June 4, 1985, denied the petition.

REASON FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The respondent respectfully requests this Court to deny the Petition for Writ of Certiorari to review the decision of the Illinois appellate court.

PETITIONER'S FAILURE TO RAISE IN THE STATE TRIAL AND APPELLATE COURTS THE CONSTITUTIONAL CLAIM NOW ADVANCED BEFORE THIS COURT PRECLUDES REVIEW OF THE CLAIM.

Petitioner in support of his petition for a writ of certiorari claims "that he has been denied the equal protection of the laws by the saving clause of the Sex Crimes Act, Ill. Rev. Stat., Ch. 38, Sections 12-12 to 18 (1984 Supp.)". (Petition for Writ of Certiorari at 8) Under the

savings clause, petitioner was to be sentenced under the law in effect at the time of the commission of the offenses, rather than under the provisions of the Sex Crimes Act. However, on direct appeal to the Illinois appellate court petitioner simply argued that "he should have been given the option to be sentenced under the law regarding sex offenses which was in effect at the time of sentencing." (Petition for Writ of Certiorari, Appendix at 1a) It is interesting that petitioner would now advance an equal protection claim before this Court, when in the circuit and appellate courts of Illinois petitioner failed to raise the issue. Petitioner admits the failure in his Petition for Writ of Certiorari before this Court in his Statement of the Case: "The equal protection argument was not raised either in the trial court or the Appellate Court." (Petition for Writ of Certiorari at 7)

Most recently, in *Gates v. Illinois*, 462 U.S. 213 (1983), this Court, after receiving briefs and hearing oral argument on the application of the Fourth Amendment to a magistrate's issuance of a search warrant on the basis of a partially corroborated anonymous informant's tip, requested the parties to address an additional question for review:

> [W]hether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, *Mapp v. Ohio*, 367 U.S. 643 . . . (1961); *Weeks v. United States*, 232 U.S. 383 . . . (1914), should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

Id. at 217. However, this Court held that it would not decide this later issue since it was not presented to or decided by the Illinois courts. This decision was made on

the basis of the rule that if both of the requirements that a federal question has been raised and decided in the state court below do not appear on the record, the jurisdiction of the Supreme Court fails. *Crowell v. Randell*, 10 Pet. 368, 391 (1836). This Court in *Gates* thus reaffirmed the jurisdictional character of the rule against deciding claims "not pressed nor passed upon" in state court as reflected in *State Farm Mutual Automobile Insurance Co. v. Duel*, 324 U.S. 154, 160 (1945). Such lack of jurisdiction accounts for the statement that this Court "cannot decide issue raised for the first time here." *Tacon v. Arizona*, 410 U.S. 351, 352 (1973).

Similarly, in *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978), petitioner sought to advance before this Court the argument that respondent lacked standing to object to the unconstitutional searches and seizures. However, the Michigan Supreme Court had refused to consider this issue because the prosecution failed to raise the issue in the courts below. Consequently, this Court held that the failure to present a federal question in conformance with state procedure constituted an adequate and independent ground of decision barring review in this Court. Similar reasoning was employed by this Court in *Hankerson v. North Carolina*, 423 U.S. 233, 236 (1977). This Court held that a question raised in a petition for writ of certiorari would not be reached where the North Carolina Supreme Court held that the issue had not been "properly presented" to it.

In the case at bar, respondent maintains this Court should not grant the petition for writ of certiorari where the issue has not been preserved for review in the courts below. As in *Gates*, *Tyler*, and *Hankerson*, the failure of petitioner in the case at bar to preserve the issue for review, precludes review of the issue by this Court. Thus,

where the equal protection issue was neither pressed by the petitioner in the courts below, nor passed upon by those courts, this Court should deny the petition for writ of certiorari.

CONCLUSION

In view of the foregoing reasons, respondent respectfully requests the petition for writ of certiorari be denied.

Respectfully submitted,

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